No. 93-1127

In the Supreme Court of the United States

OCTOBER TERM, 1993

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

MARTIN W. MATZEN
PETER A. APPEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to reopen a fifteen-year-old judgment that extinguished the petitioner Indian Tribe's aboriginal title to land lying outside of the boundaries of its Reservation.

2. Whether the trial court erred in determining the amount of damages owed to petitioner to compensate it for the erosion of rangelands on its Reservation.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 5 F.3d 1506 (Table). The opinions of the Court of Federal Claims (see note 2, *infra*) are reported at 11 Cl. Ct. 614 (*reprinted* in part at Pet. App. 15a-66a), and 26 Cl. Ct. 446 (*reprinted* in part at Pet. App. 106a-108a). The other relevant orders of the Court of Federal Claims (Pet. App. 5a-6a, 104a-105a) are unreported.[1]

[1] Other reported decisions of the Claims Court appear at 4 Cl. Ct. 575 (1984); 4 Cl. Ct. 586 (1984); 5 Cl. Ct. 288 (1984); 6 Cl. Ct. 575 (1984), rev'd mem., 776 F.2d 1063 (Fed. Cir. 1985) (Table); 8 Cl. Ct. 677 (1985); 9 Cl. Ct. 1 (1985); 9 Cl. Ct. 32 (1985); 9 Cl. Ct. 158

JURISDICTION

The court of appeals entered its judgment on August 17, 1993. A petition for rehearing was denied on September 13, 1993. Pet. App. 4a. On December 1, 1993, the Chief Justice extended the time, to and including January 11, 1994, in which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the appeal from a final judgment of the accounting phase of a case filed under the jurisdiction of the Indian Claims Commission and its successors.[2] This phase of the litigation involved various resource mismanagement claims that petitioner brought against the United States for alleged wrongs that arose before 1946. The trial court awarded petitioner slightly more than $14 million in damages for range and timber mismanagement and for improper and unaccounted for disbursements of tribal funds. Pet. App. 108a. With interest, that award now totals approximately $19 million, and interest continues to accrue on the portion of the

(1985); 10 Cl. Ct. 115 (1986); 20 Cl. Ct. 371 (1990); and 25 Cl. Ct. 333 (1992).

[2] Petitioner commenced this action before the Indian Claims Commission under Section 2 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1050. When Congress disestablished the Claims Commission, it transferred all of the Claims Commission's cases to the United States Court of Claims. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990. The United States Claims Court received jurisdiction of this case under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105, 96 Stat. 26-27. That court is now called the United States Court of Federal Claims. See *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2037 n.1 (1993).

judgment attributable to improper expenditures from one of the funds. See *ibid.* In an unpublished order, the court of appeals affirmed. Pet. App. 2a-3a.

1. a. Petitioner, along with another Indian tribe, filed its first amended petition before the Indian Claims Commission on October 18, 1950. Pet. App. 16a. The Claims Commission assigned the petition Docket No. 22, and eventually subdivided the docket into a number of cases. *Ibid.* Docket No. 22-D involved petitioner's claim that the United States had not compensated petitioner for the taking of its aboriginal lands lying outside of its reservation. In an interlocutory decision, the Claims Commission found that the government was responsible for taking those lands. *San Carlos Apache Tribe* v. *United States*, 21 Ind. Cl. Comm'n 189 (1969) (*reprinted* in part at Pet. App. 71a-76a). Petitioner and the United States subsequently entered into a settlement of that claim. *San Carlos Apache Tribe of Indians* v. *United States*, 28 Ind. Cl. Comm'n 399 (1972) (*reprinted* in part at Pet. App. 87a-94a). The settlement provided,

> Entry of Final Judgment in said amount shall finally dispose of all rights, claims or demands which the plaintiffs have asserted or could have asserted with respect to the subject matter of this suit, [Docket No. 22-D,] and plaintiffs shall be barred thereby from asserting any such rights, claims or demands against defendant in any other or future action.

28 Ind. Cl. Comm'n at 404. Petitioner settled its claim against the United States for $4.9 million, and the Claims Commission entered a final judgment against the United States in that amount. *Id.* at 419.

b. The background of the claim that petitioner brings here is as follows: In 1887, C.H. Wallace of the General Land Office surveyed the northern boundary of

petitioner's reservation; the General Land Office accepted the Wallace survey in 1888. See Pet. App. 81a. In 1967, before the settlement in Docket No. 22-D, the Secretary of the Interior rejected a request for a resurvey of the boundary, finding no gross error requiring resurvey. *Id.* at 80a-86a. Petitioner did not seek judicial review of that decision. In 1984, however, petitioner sued federal officials in federal district court to quiet title to the disputed lands, claiming that these lands lie inside the boundaries of petitioner's reservation. In that case, the district court held that the settlement in Docket No. 22-D precluded relitigation of the boundary issue, and the court of appeals affirmed. See *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. 185 (D. Ariz. 1984), aff'd *sub nom. White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921, 926 (9th Cir.), cert. denied, 479 U.S. 1006 (1986).[3]

Having failed to quiet title to the disputed land in that manner, petitioner sought to amend the 1972 consent judgment in Docket No. 22-D. In 1987, in the course of proceedings in Docket No. 22-H, petitioner filed a motion to amend the judgment in Docket No. 22-D. In support of that motion, petitioner claimed that its former attorneys in Docket No. 22-D misled petitioner as to the effect of the 1972 judgment and that the trial court should modify the 1972 judgment because petitioner was a victim of fraud. The United States argued that the motion was

[3] Petitioner's claim concerning the amount of land affected by the survey has gradually increased through the years. In 1967, it appeared that 12,000 acres were at issue. See Pet. App. 80a. By the time of the Arizona litigation, the amount was 14,000 acres. See *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. at 187. Petitioner raised its claim below to 16,000 acres. See Pet. App. 109a. Petitioner now claims that the Wallace survey deprived it of 16,090 acres. Pet. 19.

untimely because the current claims attorney had known about the alleged fraud since 1983, but did not move for relief from the judgment until 1986. C.A. App. 204. In addition, the government argued that petitioner had not met the burden for relieving petitioner of the consent judgment in Docket No. 22-D. *Id.* at 205-208. The trial court denied petitioner's motion, adopting the government's memorandum as the basis for its decision. Pet. App. 5a-6a. Petitioner attempted several interlocutory appeals of that decision, all of which the court of appeals dismissed for lack of jurisdiction. See, *e.g.*, *id.* at 95a, 101a.

2. The claims in Docket No. 22-H alleged resource mismanagement. Those claims eventually went to trial in 1987.[4] At trial, petitioner presented evidence that the United States had mismanaged petitioner's rangelands. Petitioner contended that the United States permitted overstocking and overgrazing on those lands, which caused erosion and reduced the carrying capacity of the rangelands. Pet. App. 26a.

[4] In 1980, petitioner and the United States had reached a proposed settlement in which the United States agreed to pay petitioner $13 million for all claims raised in Docket No. 22-H. See 6 Cl. Ct. at 585. Petitioner rejected the proposed settlement, *id.* at 584, and then caused further delay by refusing to obey certain orders of the trial court. See 4 Cl. Ct. at 576. As a sanction, the trial court dismissed petitioner's case with prejudice. 6 Cl. Ct. at 578-583. To soften this blow, the trial court entered a judgment in petitioner's favor for $10 million, which represented approximately three-quarters of the settlement offer that the United States had made in 1980. *Id.* at 585. Both parties appealed. In an unpublished order, the court of appeals reversed the trial court's dismissal and vacated the judgment entered against the United States. *White Mountain Apache Tribe* v. *United States*, 776 F.2d 1063 (Fed. Cir. 1985) (Table).

The trial court found that the United States had a fiduciary obligation to petitioner with respect to its rangelands. The fiduciary relationship arose because the United States

> established a program of leasing grazing land under permits to non-Indian livestock owners. It was under no obligation to do so. But having undertaken to administer this program, the Government was obligated to act in a fiduciary capacity toward those lands.

Pet. App. 26a-27a. The trial court also found that the government's "careless administration" allowed petitioner's rangelands to become overstocked and overgrazed. *Id.* at 31a.

While petitioner contended that the overgrazing caused all of the erosion on its rangelands, Pet. App. 34a-35a, the government "attribute[d] the cause [of erosion] to wholly natural climatic forces operative throughout the Southwest generally." *Id.* at 34a. The trial court determined that

> neither climate nor overgrazing was the sole cause of accelerated erosion on the reservation, but rather that the overgrazed condition of the reservation's rangeland predisposed it to the erosive forces of the climate, ultimately resulting in the damaged and eroded condition that persists today. Since the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.

Id. at 46a (emphasis omitted).[5] The trial court tempered this finding by holding that the government was not responsible for all erosion that occurred on the Reservation, because some erosion could be attributed to climate. *Id.* at 47a.

In determining the amount of damages, the trial court balanced the parties' differing approaches to damages. See Pet. App. 55a. The trial court rejected petitioner's proposed measure of restoration costs, *id.* at 56a; see also 10 Cl. Ct. at 117-118, and instead determined the diminution in the market value of the Reservation. Pet. App. 56a. After reviewing various methods to determine that diminution, the trial court settled on the approach of the government's expert, whose testimony it found "especially persuasive." *Id.* at 58a. The trial court began with a potential leasing value of the Reservation if left pristine, deducted the amount that petitioner actually received from grazing permittees, and added the "capitalized amount of the reduced range value." *Id.* at 60a. The trial court adjusted its calculation of the current carrying capacity of the rangelands upward to reflect the amount of damage caused by climate instead of overgrazing, and added some damages to reflect lease revenue that petitioner might have received if the rangelands had not been overgrazed. Based on these calculations, the court awarded $3,627,000 to petitioner on its rangeland mismanagement claim, which included damages for the resulting erosion to petitioner's rangelands. *Id.* at 61a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 2a-3a. Finding the trial court's opinions to

[5] The emphasis that appears in the petitioner's appendix does not appear in the opinion as reported in the Claims Court Reporter. See 11 Cl. Ct. at 659.

be "thorough and exhaustive," *id.* at 3a, the court of appeals held that the trial court "correctly rejected each of [petitioner's] remaining claims to damages and, in doing so, has properly considered, analyzed and rejected all further arguments that [petitioner] has put forth in support of such claims." *Ibid.* The court of appeals also noted that petitioner had mentioned "in its statement of the facts" the dispute over the alleged missurvey of the northern boundary of petitioner's reservation. *Id.* at 3a n.2. The court of appeals did not consider that argument, however, because petitioner "ha[d] not presented any argument on appeal concerning this claim and the government persuasively explained that it was resolved and subsumed in other proceedings." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The first question petitioner raises was waived below. The court of appeals noted in its unpublished opinion that petitioner asserted "in its statement of the facts" that the United States had deprived it of the disputed 16,000 acres through an incorrect survey. Pet. App. 3a n.2. The court noted, however, that petitioner had not "presented any argument on appeal concerning this claim." *Ibid*; see also *id.* at 109a-112a. Because petitioner never supplied that court with any reason to reverse the trial court on the issue, the court of appeals never passed on it. As a general rule, this Court will not review issues that the court below has not passed upon. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113

S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[6]

In any event, petitioner's claim is without merit. In the trial court, petitioner moved to amend the judgment in Docket No. 22-D. The trial court's denial of that motion is reviewed only for an abuse of discretion. The judgment in Docket No. 22-D extinguished any claim that petitioner had to the disputed 16,000 acres.[7] Petitioner had previously sought to quiet title to the disputed lands in *White Mountain Apache Tribe* v. *Clark*, 604 F. Supp. 185 (D. Ariz. 1984). The district court held in that case that "[t]he Indian Claims Commission did rule that there had been a taking of all lands lying outside of the boundary of the reservation. That boundary *is* the Wallace Survey boundary." *Id.* at 188 (citation omitted). The Ninth Circuit affirmed that holding. *White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921, 926, cert. denied, 479 U.S. 1006 (1986).[8]

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[6] Petitioner argues that the courts below denied it "judicial due process" (Pet. 27) because they assertedly denied petitioner "its right to be heard" regarding the disputed parcels. Pet. 29. Petitioner had an opportunity to be heard by the trial court; that court simply rejected petitioner's contentions. Petitioner also had an opportunity to be heard in the court of appeals when it appealed the final judgment in this case; petitioner simply failed to avail itself of that opportunity.

[7] Petitioner's former claims attorney filed a brief as *amicus curiae* in the court of appeals arguing that the judgment in Docket No. 22-D did not extinguish title to the disputed lands. The litigation in the Ninth Circuit construed the 1972 consent judgment differently, however, and found that it had extinguished petitioner's claim to title.

[8] Petitioner wrongly asserts (Pet. 28-29) that the United States cannot rely on the preclusive effects of the Ninth Circuit's judgment because the United States was not a party to that litigation. Petitioner sought to quiet title to land that the United States owns,

2. Petitioner also contends (Pet. 23-27) that the trial court refused to award petitioner damages for erosion that took place on its Reservation. In Indian claims cases in which a Tribe claims damages like those at issue here, the Tribe is awarded damages in an amount equal to the diminution in the value of its reservation. See, *e.g.*, *Gila River Pima-Maricopa Indian Community* v. *United States*, 467 F.2d 1351, 1357 (Ct. Cl. 1972). Petitioner does not question that rule. Petitioner claims only that the trial court awarded petitioner too little in damages as a factual matter. Specifically, petitioner complains that the trial court did not adopt its expert's opinion on the issue of damages. That claim has no merit, and does not warrant this Court's review.

The trial court found the approach of the government's expert "especially persuasive." Pet. App. 58a. Petitioner had every opportunity to present its own evidence and its experts' reports to the trial court. That court simply found other evidence more persuasive. The determination of weight accorded to evidence lies within the province of the factfinder, not a reviewing court. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The trial court determined the amount of damages on the

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and it brought suit against federal officers; the United States was the real party in interest in that litigation. Petitioner had a full and fair opportunity to litigate the title issue, and it should be precluded from relitigating it. See *Montana* v. *United States* 440 U.S. 147, 153-154 (1979); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971). In any event, even if the United States could not rely on the preclusive effect of the judgment in the quiet title action, the trial court did not abuse its discretion in refusing to modify the judgment in Docket No. 22-D.

basis of its weighing of the evidence, Pet. App. 61a,[9] and the court of appeals affirmed that factual determination. *Id.* at 3a. This Court should not depart from its usual practice of declining to review findings of fact concurred in by both courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

MARTIN W. MATZEN
PETER A. APPEL
Attorneys

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[9] The trial court awarded petitioner $3,627,000 in damages to compensate petitioner for damage to its rangelands. Pet. App. 61a. As a factual matter, that amount includes damages for erosion. The trial court is not obligated to specify the precise amount of damages attributable to erosion.